FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 57

UNITED STATES OF AMERICA,
Petitioner,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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Questions Presented*

1. Whether the Court of Appeals had jurisdiction of an appeal which raised only the question whether the District Court had complied with the judgment of this Court in *Lucchese* v. *United States*, 356 U. S. 256, directing dismissal of the denaturalization complaint.

* The petitioner's phrasing of the question presented (Brief p. 2) ignores the procedural posture of the case. Respondent believes for reasons hereinafter set forth that only the questions as here set forth are properly before the Court in this proceeding.

2. If the Court of Appeals had jurisdiction of that question, whether the District Court's entry of an order of dismissal omitting the words "without prejudice" constituted compliance with this Court's judgment remanding with directions "to dismiss the complaint".

Statement

A material fact omitted from the petitioner's statement of the case (Brief pp. 3-5) is the ground of respondent's motion to dismiss the Government's appeal to the Court of Appeals. Respondent's motion was expressly grounded upon lack of jurisdiction of the appeal in the Court of Appeals (R. 39). The Court of Appeals' order and judgment, now before this Court for review, which dismissed the appeal, specifically refers to this ground of respondent's motion (R. 42).

Summary of Argument

1. If petitioner deemed this Court's judgment directing dismissal of the complaint (R. 29) in *Lucchese* v. *United States,* 356 U. S. 256 too sweeping a disposition of the case, or for some reason considered the direction to be ambiguous, it might have petitioned for rehearing within twenty-five days of the judgment pursuant to Rule 58 of this Court's Rules, and sought modification, amendment, or clarification of the judgment. It did not do so. A correct decision by the Court of Appeals as to its jurisdiction ought not be reversed, because the petitioner failed to seek relief by appropriate procedure and at the proper time.

The petition for certiorari granted by this Court sought review of the Court of Appeals' order dismissing the Government's appeal for lack of jurisdiction. Since con-

struction of this Court's mandate directed to the District Court to dismiss the denaturalization complaint was not within the jurisdiction of the Court of Appeals, that Court properly dismissed the appeal. Upon clear authority a Court of Appeals has no jurisdiction to determine whether a District Court has complied with a mandate of this Court. Hence its order dismissing the Government's appeal should be affirmed.

2. The District Court, in carrying out its ministerial duty of effectuating this Court's mandate, properly refused to add the words "without prejudice" to its order dismissing the complaint. This Court had included no such qualification in its direction to the District Court. The District Court was not entitled to intermeddle with this Court's judgment by attempted embellishment of it to suit the Government's wishes.

There was no necessary implication (as claimed by petitioner) in this Court's judgment that the dismissal to be entered should be without prejudice. The only issue briefed before this Court in *Lucchese* v. *United States*, 356 U. S. 256, and companion cases simultaneously decided, was whether the statutory affidavit must be filed with the complaint in a denaturalization case. The issue of whether a dismissal for failure to do so must necessarily and always be without prejudice to filing a new suit was not before this Court in those cases, nor in *United States* v. *Zucca*, 351 U. S. 91, and hence was not determined. This Court in affirming the dismissal in *United States* v. *Zucca, supra*, avoided expressing approval of the fact that the original dismissal by the District Court had been "without prejudice".

If, as inconsistently claimed by petitioner, the District Court was left "free" as to this issue because the issue had not been settled by this Court's decision, there is no basis for a finding that the issue was improperly decided by the District Court.

The equities of the situation did not favor a grant of leave to reinstitute the action, since the Government had delayed fifteen months from the date of this Court's judgment before submitting an order on judgment to the District Court; and the original action filed in 1952 was predicated on an alleged failure in 1941 by the respondent to disclose to naturalization examiners arrests many years before on charges which were never prosecuted, although he disclosed to them the only charge upon which he had ever been convicted. Under such circumstances the District Court, if it had discretion, was entitled to dismiss with prejudice; certainly it had no reason to suppose that this Court by implication had directed that leave be granted to reinstitute such an action.

ARGUMENT

I

The Court of Appeals rightly dismissed the Government's appeal for lack of jurisdiction.

The petitioner phrases the question presented (Brief p. 2) as though it were now belatedly seeking rehearing, and modification, or amendment, or amplification of this Court's mandate in *Lucchese* v. *United States*, 356 U. S. 256. But this is to lose sight of the fact that the Government's petition for a writ of certiorari here (Pet. p. 1) sought to review a dismissal of its appeal by the Court of Appeals based upon lack of jurisdiction. Since the Court of Appeals was without jurisdiction of the Government's appeal, the dismissal by that Court was proper in any event and should therefore be affirmed.

The Government by its appeal (R. 37) to the Court of Appeals sought to review in that Court the District Court's refusal to incorporate the words "without prejudice" in its dismissal order entered pursuant to this Court's mandate in *Lucchese* v. *United States*, 356 U. S. 256. The only question, therefore, which was presented by that appeal was whether the District Court had or had not complied with the directions contained in this Court's remand of the case "to dismiss the complaint" (R. 29). Since that was a question which was plainly not within the jurisdiction of the Court of Appeals, respondent moved to dismiss the appeal upon that ground (R. 39). The order of the Court of Appeals now under review, which granted respondent's motion, specifically recites that the motion was one to dismiss "for lack of jurisdiction" (R. 42).

In *Ex parte First National Bank of Chicago*, 207 U. S. 61, where the Circuit Court of Appeals assumed the power to decide a question of compliance with this Court's mandate and to give directions to the District Court in a case arising in proceedings in the District Court subsequent to the issue of a mandate from this Court, this Court said (p. 66) "The circuit court of appeals had no jurisdiction in the matter."

In *Ohio Oil Co.* v. *Thompson*, 120 F. 2d 831, cert. den. 314 U. S. 658, the Circuit Court of Appeals for the Eighth Circuit cited *Ex parte First National Bank of Chicago*, *supra* for this proposition, as well as *In Re Sanford Fork & Tool Co.*, 160 U. S. 247, in dismissing such an appeal.

See also *Christoffel* v. *United States*, 214 F. 2d 265, (C.A.D.C.), cert. den. 348 U. S. 850.

Appeals were dismissed for the same reason in *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 142 F.

2d 549 (C.C.A. 7), and *Ringhiser* v. *Chesapeake & Ohio Railway Co.*, 264 F. 2d 62 (C.C.A. 6). In the case last cited the Circuit Court of Appeals while expressly dismissing the appeal for lack of jurisdiction, took occasion to add, nevertheless, as did the Court of Appeals in the present case (R. 41), that the District Court's action was in fact in compliance with this Court's mandate. Such observation, while in our view correct, was nevertheless, it is respectfully submitted, mere *obiter dicta*.

Since construction of this Court's mandate was not within the jurisdiction of the Court of Appeals, that Court properly dismissed the appeal.

The Government might have sought rehearing pursuant to Rule 58 of this Court's Rules within 25 days after this Court's decision of this matter on April 7, 1958 (356 U. S. 256), in order to attempt to secure modification or amendment of this Court's mandate, but it did not do so. Instead, it now seeks to review by certiorari proceedings a dismissal by the Court of Appeals which the Court of Appeals was obliged to grant. Hence the order of the Court of Appeals should be affirmed by this Court.

II

The District Court's order of dismissal complied with this Court's mandate.

The question whether the District Court's entry of an order dismissing the denaturalization complaint and omitting the words "without prejudice" constituted compliance with this Court's mandate—although in our view not properly reached here upon certiorari proceedings to review the Court of Appeals' dismissal of petitioner's

appeal for lack of jurisdiction—must (if it is to be considered) be answered in the affirmative.

The Government's argument on this point is hardly consistent. It argues that this Court's mandate "contemplated" a dismissal without prejudice, and that such a dismissal was necessarily implied in this Court's mandate, and hence that the District Court was actually obliged to enter only such a dismissal.

That part of its argument would seem to impose upon the District Court the quite unwarranted requirement that it read into this Court's unambiguous mandate to dismiss unstated directions of substantial effect and add them to the dismissal order.

Surely this would be the very "embellishment" and "intermeddling" by the District Court which has been forbidden to the District Courts in carrying out the merely ministerial duty of effectuating mandates.

In *Sibbald* v. *United States*, 12 Pet. 488, 9 L. Ed. 1167, this Court said:

> "The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded."

Many authorities to the same effect are cited in *Thornton* v. *Carter*, 109 F. 2d 316, 320, footnote 4.

There is no basis whatsoever for petitioner's argument that the dismissal directed by this Court necessarily implied a dismissal without prejudice, and that it should have been so understood by the District Court.

The question whether a dismissal against the United States of a denaturalization case for failure to file the statutory affidavit should be with or without prejudice to further proceedings was not before this Court when it decided *Lucchese* v. *United States,* 356 U. S. 256, and hence it was not decided, and could not have been decided, either expressly or by implication.

Similarly in *United States* v. *Zucca,* 351 U. S. 91, 100, this Court concluded its opinion with the words,

> "The District Court below correctly dismissed the proceedings in this case because of the failure of the Government to file the required affidavit and the judgment of the Court of Appeals is therefore Affirmed."

This Court refrained from stating that the District Court in *Zucca* had correctly dismissed "without prejudice". The propriety of the original dismissal having been "without prejudice" was not before this Court in the *Zucca* case, certiorari having been neither sought nor granted to review that particular question, any more than it was in *Lucchese* v. *United States, supra,* or in *United States* v. *Diamond,* 356 U. S. 257 cited by petitioner.

This Court has never stated that dismissals for failure to file the statutory affidavit in time must necessarily be without prejudice to a new action. In the present case good reasons existed to terminate this proceeding with finality. The District Court was aware of them, and in seeking to carry out this Court's unambiguous direction had no basis for conjuring up implications to the contrary, as the Court of Appeals indicated in its opinion herein (R. 41).

From page 11 to page 13 of its Brief the Government argues, inconsistently, that the District Court might

properly have included the words "without prejudice" in its order because the District Court was left "free as to any issue within its jurisdiction which was not settled by the higher court's decision." This would seem to amount to a contention that since this Court did not rule on whether the dismissal should be with or without prejudice, having had before it an entirely different question, its judgment left the District Court free to enter a dismissal without prejudice, or, for that matter, with prejudice, as it saw fit. If the District Court was indeed "free" in this respect, and entitled to exercise its discretion, petitioner has no standing here. There is certainly no showing that such discretion, if it existed, was abused.

Respondent came to this country at the age of 11 and is now almost 62 years old (R. 1). This proceeding to denaturalize him was commenced in November 1952 upon the peculiar and paradoxical charge, in substance, that when applying for naturalization in 1941, although he disclosed to the examiners his only conviction for crime, he failed to disclose mere arrests many years before where he was discharged without prosecution (R. 1-6).*

In *United States* v. *Zucca, supra,* this Court said:

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once

* *Cf. Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 241: "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that some one probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated."

> admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded."

It was through no fault of respondent that the Government failed to file its statutory affidavit in his case until three years (R. 7) after the proceeding was commenced, when it was compelled to do so.

After this Court's judgment of April 1958 merely directing dismissal of the complaint the Government filed no petition for rehearing; and it waited *fifteen months* before even attempting to enter in the District Court an order of dismissal "without prejudice." (R. 29-33).

The District Court's informal remark upon the hearing of the Government's motion to resettle its order (which it denied), "We have been fooling around with this thing for some time" (R. 35), is pregnant with significance in this context of dilatoriness. Eight years after starting this action to denaturalize respondent, and nineteen years after his application for naturalization, petitioner now belatedly seeks to lay the groundwork to start the case anew, with complete disregard for the respondent's reputation, or for his ability to secure witnesses to testify in his defense after so great a period of time. The contention that the District Court should have reasoned that this Court "by implication" directed so inequitable a result is little short of preposterous.

CONCLUSION

For the foregoing reasons respondent respectfully submits that the judgment of the Court of Appeals should be affirmed and the order of the District Court should be left undisturbed.

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